IN THE MISSOURI SUPREME COURT

No. SC94927

STATE OF MISSOURI,

Respondent,

v.

DERRICK L. CARRAWELL,

Appellant.

On Appeal from Circuit Court for City of St. Louis

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

AUTHORITY TO FILE

Amicus files this brief with the consent of all parties.

STATEMENT OF JURISDICTION

Amicus adopts the jurisdictional statement as set forth in Appellant's brief.

STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. The ACLU of Missouri Foundation is an affiliate of the national ACLU. The ACLU of Missouri has more than 4,500 members. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions. The ACLU has filed *amicus* briefs in this Court on free speech issues. *See, e.g.*, *Gurley v. Mo. Bd. of Private Investigator Exam'rs*, 361 S.W.3d 406 (Mo. banc 2012); *Smith v. Pace*, 313 S.W.3d 124 (Mo. banc 2010).

STATEMENT OF FACTS

Amicus adopts the statement of facts as set forth in Appellant's brief.

Argument

"The freedom of inviduals to verbally oppose or challenge police action without thereyby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). This is a free nation, not a police state, so Derrick Carrawell's arrest for verbally opposing and challenging the police was unlawful.

I. Because Carawell's expression did not constitute "fighting" words, there was no probable cause for his arrest and evidence seized incident to his unlawful arrest should be suppressed.

As this Court has recognized, "[t]he freedom of speech guaranteed in the United States and Missouri Constitutions limits the ability of our legislature to criminalize spoken words." *State v. Roberts*, 779 S.W.2d 576, 578 (Mo. banc 1989).[1] Nevertheless, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942). One of the narrow classes of unprotected speech is "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572.

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[1] "The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law . . . abridging the freedom of speech.'" *Virginia v. Black*, 538 U.S. 343, 358 (2003).

Carrawell's expressive activity did not fall within this exception to the limitations placed on the government's prosecution of speech embodied in the First Amendment.[2] The criticism of public officials lies at the heart of speech protected by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964); *see also Hill*, 482 U.S. at 462-63. Because of our Nation's strong commitment to the protection of free speech, expression criticizing or directly challenging a police officer is protected by the First Amendment, even if the expression is vulgar, derogatory, or obscene. *See Hill*, 482 U.S. at 461-63.

The ordinance used to justify Carrawell's arrest is a peace disturbance or breach-of-the-peace law.

The ordinance states:

> Any person who shall disturb the peace of others by noisy, riotous or disorderly conduct, or by violent, tumultuous, offensive or obstreperous

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[2] Carrawell engaged in expressive conduct directed to a police officer while on a public street and sidewalk. It is at such locations that protections of the First Amendment are at their zenith. The Supreme Court has "repeatedly referred to public streets as the archetype of a traditional public forum" and noted that "public streets and sidewalks have been used for public assembly and debate" since "time out of mind." *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

> conduct or carriage, or by loud and unusual noises, or by unseemly, profane, obscene, indecent, lewd or offensive language, calculated to provoke a breach of the peace, or by assaulting, striking or fighting another in any park, street, alley, highway, thoroughfare, public place or public resort within the City, or any person who, in the City, shall permit any such conduct in or upon any house or premises owned or possessed by him or under his management or control, so that others in the vicinity are disturbed thereby, shall be guilty of a misdemeanor.

St. Louis, Mo. Code of Ordinances 15.46.030.[3] The ordinance cannot be constitutionally applied to criminalize Carrawell's expressive activity.[4]

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[3] Because a certified copy of the ordinance was not before the trial court, the court could not take judicial notice of the ordinance and, as a result, there was no basis for the trial court's conclusion that the officer had probable cause to arrest Carrawell under § 15.46.030. "A court may not take judicial notice of the existence or contents of city or county ordinances." *Consumer Contact Co. v. State, Dep't of Revenue*, 592 S.W.2d 782, 785 (Mo. banc 1980); *see also* § 479.250, RSMo. Without the ordinance in the record, there was no basis for the trial court to conclude that Carrawell's arrest was lawful. *See Consumer Contact Co.*, 592 S.W.2d at 786.

[4] The punishment of speech critical of state authority is Orwellian. Indeed, the arrest of Carrawell parallels Winston Smith's arrest by the Thought Police for

"[I]nsofar as 'breach of the peace' or 'peace disturbance' laws or ordinances are concerned, it is essential to their constitutional validity that they operate so as to punish the speaker only when his verbal conduct (speech) is such that, in the given factual setting, it is reasonably likely to incite others to violence (breach of the peace)." *City of St. Louis v. Tinker*, 542 S.W.2d 512, 519 (Mo. banc 1976); *see also State v. Swoboda*, 658 S.W.2d 24, 25 (Mo. banc 1983); *City of Maryville v. Costin*, 805 S.W.2d 331, 332 (Mo. App. W.D. 1991). This careful scrutiny is required because, "[w]hen the charge of peace disturbance is based upon verbal conduct, there is always the risk that free speech will be suppressed." *Tinker*, 542 S.W.2d at 520; *see also Cohen v. California*, 403 U.S. 15, 26 (1971) (noting that the Court could not "indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process"). In other words, because of the risk of unconstitutional suppression, peace disturbance laws "must be construed so as to prevent only . . . 'fighting words.'" *Swoboda*, 658 S.W.2d at 25, 26; *see also State v. Carpenter*, 736 S.W.2d 406, 408 (Mo. banc 1987); *Costin*, 805 S.W.2d at 332.

While fighting words are a category of unprotected speech, such speech can be prohibited "only if it is personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances that the words have a direct tendency

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transcribing "DOWN WITH BIG BROTHER." *See* George Orwell, 1984 (Ed. Erich Fromm 1949).

to cause an immediate violent response by a reasonable recipient." *Carpenter*, 736 S.W.2d at 408; *see also Costin*, 805 S.W.2d at 332. Even provocative and challenging speech is "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

Carrawell's expression did not constitute fighting words. From across the street, Carrawell stared at police officers, including Curtis Burgdorf, grabbed his own crotch, spit in Burgdorf's direction, and asked him "what the fuck are you looking at, bitch?" Tr. 160-61, 195. Thereafter, Carrawell "muttered" additional profanities directed at Burgdorf and other officers and, when Burgdorf approached him, asked Burgdorf "what the fuck are you going to do?" Tr. 161-64, 196-99. Not surprisingly, none of the officers to whom Carrawell directed his expression responded violently. Indeed, his speech was not the type likely to cause an immediate violent response by a reasonable recipient, much less by a properly trained police officer.

Burgdorf testified that "it was definitely clear that [Carrawell] was speaking to [the police officers]." Tr. 197; *see also* Tr. 197-99 (noting further that, although Carrawell was muttering, he "continued his profanities towards ... [Burgdorf] and the other detectives" and speculating that people on street were "taken aback that [Carrawell] was speaking to the police like that"). Even if Carrawell's expression might constitute fighting words if directed to a civilian, the government's ability to criminalize Carrawell's speech is further restricted because it was directed at the police. *See, e.g.*, *Brown v. Oklahoma*, 408 U.S. 914 (1972) (vacating and remanding for reconsideration in

the light of *Cohen v. California*, 403 U.S. 15 (1971), and *Gooding v. Wilson*, 405 U.S. 518 (1972); the decision in the underlying *Brown v. State*, 492 P.2d 1106, 1107 (Okla. Crim. App. 1972), had upheld a conviction under an obscene language ordinance where the plaintiff referred to the police as "mother-fucking fascist pig cops" and "that black mother-fucking pig McIntosh"); *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990) (concluding that the use of the word "asshole" when addressing an officer did not constitute fighting words); *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (finding that "police may resent having obscene gestures and words directed at them, but they may not punish individuals for such disgraceful conduct as it is lawful and protected by First Amendment"); *Cavazos v. State*, 455 N.E.2d 618, 620 (Ind. 1983) (holding, as a matter of law, that calling a police officer an "asshole" does not constitute fighting words); *People v. Gingello*, 324 N.Y.S.2d 122, 124-25 (N.Y. Crim. Ct. 1971) (holding that defendant's use of the words "you are an asshole" directed to a police officer did not constitute fighting words so as to justify a charge of disorderly conduct).

Indeed, given police officers' training not to respond negatively to invective, it would be rare that expression directed at a police officer could constitute fighting words because police officers are too poised to respond with violence. As the Supreme Court has recognized, "the 'fighting words' doctrine may be limited in the case of communications addressed to properly trained police officers because police officers are expected to exercise greater restraint in their response than the average citizen." *Buffkins*, 922 F.2d at 472 (citing *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring) (noting that "a properly trained officer may reasonably be expected to

'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words'" (citation omitted)).

Even assuming, *arguendo*, that Carrawell's expression might constitute fighting words in the abstract, it is undisputed that his speech was directed at police officers. No reasonable police officer would be incited to violence by mere words or nonthreatening gestures, particularly not the words uttered by Carrawell.

Because Carrawell's expression neither inflicted immediate injury nor incited an immediate breach of the peace from the officers to whom it was directed, his expression could not reasonably be considered fighting words and, thus, there was no probable cause for an officer to believe that Carrawell violated the peace disturbance ordinance. "It is . . . fundamental that a lawful arrest may not ensue where the arrestee is merely exercising his First Amendment Rights." *Copeland v. Locke*, 613 F.3d 875, 880 (8th Cir. 2010) (quoting *Gainor v. Rogers*, 973 F.2d 1379, 1387 (8th Cir. 1992)). Here, there was no probable cause to believe that Carrawell's expression was criminal. There is probable cause to arrest only when a prudent person would believe that a suspect has committed a crime. *State v. Tokar*, 918 S.W.2d 753, 767 (Mo. banc 1996). In *Copeland*, an individual was arrested for using "loud, profane language" and "expressive gestures" toward a police officer whom he wanted to move his cruiser, interfering with the officer's conduct of a traffic stop. 613 F.3d at 880. The Eighth Circuit concluded that "[n]o reasonable police officer could believe that he had actual probable cause to arrest a citizen for such protected activity." *Id.*

Because Carrawell's expression was protected by the First Amendment, there was no lawful basis to arrest him. Carrawell's expression did not constitute fighting words because it would not cause an immediate violent response by a reasonable recipient. Moreover, his speech is protected because it was directed at police officers, who should have a higher degree of restraint than ordinary citizens such that they would never respond to the type of speech uttered by Carrawell with violence.

II. St. Louis City Ordinance § 15.46.030 is facially unconstitutional.

Reliance on an unconstitutional law to make an arrest does not create probable cause to make an arrest. *See Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1156-57 (8th Cir. 2014) (finding police officer lacked probable cause for arrest, even with a warrant, because it is obvious that Missouri's flag desecration law could not be the basis for arresting an individual for expressive activity). However, the existence of § 15.46.030 might have confused Burgdorf by making him think—albeit unreasonably—that Carrawell could be arrested notwithstanding the protections of the First Amendment. Section 15.46.030 is facially unconstitutional because it is content-based (proscribing only certain categories of speech—speech that is "unseemly, profane, obscene, indecent, lewd or offensive") and because it is substantially overbroad.

A. Section 15.46.030 is an unconstitutional content-based restriction on speech.

Laws that proscribe speech or expressive conduct based on content are presumptively invalid "and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct.

2218, 2226 (2015); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). And, even assuming "that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine," the ordinance nonetheless "is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects that speech addresses." *R.A.V.*, 505 U.S. at 381.

A municipal government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed*, 135 S. Ct. at 2226 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). *Reed*, like earlier Supreme Court cases, recognized two categories of regulations that are content-based on their face: "obvious" facial distinctions that distinguish between regulated and unregulated speech "by particular subject matter," and "more subtle" distinctions that outlaw certain expressions based on their "function or purpose." *Id.* at 2227. All content-based laws and ordinances are subject to strict scrutiny, regardless of the government's "benign motive" or "content-neutral justification" for adopting the law. *Id.* In addition, "laws that cannot be 'justified without reference to the content of regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys'" are also subject to strict scrutiny analysis. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Therefore, though a nefarious motive can heighten the scrutiny applied to a content-neutral law, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.*

Thus, any law that prohibits "fighting words" must do so neutrally; it cannot do so in a manner that "consist[s] of selective limitations on speech." *R.A.V.*, 505 U.S. at 391,

392 (finding the statute at issue invalid because it prohibited only those "fighting words" that "provoke[d] violence . . . 'on the basis of race, color, creed, religion or gender,'" leaving out fighting words that are not "addressed to one of the specified disfavored topics"). Here, selectively singling out certain categories of speech for prohibition "creates the possibility that the city is seeking to handicap the expressing of particular ideas." *Id.* at 394; *see also Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 790 (8th Cir. 2015) (finding that a Missouri statute's prohibition of "profane discourse and rude or indecent behavior is content based").

The fact that a listener might be annoyed with a message is not a content-neutral basis to restrict it. Annoyance with a message, or its disturbance of a person, does not permit its suppression. *See Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971). "[T]he right to free speech 'includes the right to attempt to persuade others to change their views' which 'may not be curtailed simply because the speaker's message may be offensive to his audience.'" *Survivors Network*, 779 F.3d at 789 (quoting *Hill v. Colorado*, 530 U.S. 703, 716 (2000)). Put another way, "[e]ven expression that may be perceived as offensive, rude, or disruptive remains protected by the First Amendment." *Id.* at 792. As the Supreme Court has made clear, "audience disapproval or general concern about disturbance of the peace does not justify regulation of expression." *Id.* at 790 (citing *Texas v. Johnson*, 491 U.S. 397, 407-08 (1989)).

The Supreme Court has repeatedly recognized that listeners' reactions to speech are not the types of secondary effects associated with expression that can be neutrally regulated. *See Boos v. Barry*, 485 U.S. at 312, 321 (1988) ("The emotive impact of

speech on its audience is not a 'secondary effect.'"); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). As the Third Circuit has observed, "where the government regulates speech based on its perception that the speech will spark fear among or disturb its audience, such regulation is by definition based on the speech's content." *United States v. Marcavage*, 609 F.3d 264, 282 (3d Cir. 2010). Courts "have consistently held unconstitutional regulations based on the reaction of the speaker's audience to the content of expressive activity." *Id.*

Section 15.46.030 is an unconstitutional content-based restriction on expression in two ways. First, it bans not all disturbing speech, only "unseemly, profane, obscene, indecent, lewd or offensive language." Second, it makes speech criminal (or not) based on the reactions of third parties to the expression. There is no compelling government interest that justifies a content-based restriction on speech in a peace disturbance ordinance.

B. Section 15.46.030 is substantially overbroad.

In addition to being a content-based restriction on speech that cannot survive strict scrutiny, the ordinance is also facially overbroad. *See Lewis*, 415 U.S. at 131-32, 134 (finding an ordinance that made it unlawful for a person "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duties" overbroad and facially invalid).

Overbreadth analysis is performed in two steps. First, this Court must determine what conduct the ordinance proscribes; second, this Court assesses whether the

ordinance, so construed, criminalizes speech that is constitutionally protected. *United States v. Williams*, 553 U.S. 285, 293 (2008); *see also Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1158 (8th Cir. 2014).

In the context of a First Amendment challenge, an ordinance "may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the [ordinance]'s plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). "The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned v. City of Rockford*, 408 U.S. 104 114-15 (1972). Thus, while the government has the authority to prohibit fighting words, a speech prohibition will be upheld only if it is "not also susceptible of application to protected expression." *Gooding*, 405 U.S. at 523.

In other words, if an ordinance sweeps so broadly that it can be applied to constitutionally protected speech, it "is considered completely unconstitutional on its face even though it is capable of application in a constitutional manner, on the theory that the very existence of laws which can be applied to protected speech exercises an unacceptable inhibiting effect on free debate." *Collin v. Smith*, 447 F. Supp. 676, 692 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978); *see also State v. Carpenter*, 736 S.W.2d 406, 407 (Mo. banc 1987) (finding criminal laws "'that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application'" (quoting *Hill*, 482 U.S. at 459)). Instead,

an ordinance "must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding*, 405 U.S. at 522. "'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Section 15.46.030 prohibits much more than fighting words, including language that is "unseemly, profane, obscene, indecent, lewd or offensive[.]" Expression constitutes fighting words only if it is "addressed in a face-to-face manner to a specific individual and uttered under circumstances that the words have a direct tendency to cause an immediate violent response by a reasonable recipient." *Carpenter*, 736 S.W.2d at 408 (defining fighting words).

In addition to restricting non-fighting words, this ordinance—like the peace-disturbance statute struck down in *Swoboda*—is overbroad in another way because it applies regardless of whether the "complainant" is "the addressee towards whom any impermissible speech may be directed." 658 S.W.2d at 26. Thus, the ordinance "seeks to punish more than face-to-face words," *id.*, including expressive activity that simply annoys a bystander. That is, § 15.46.030 also applies in situations where there *is* no individual addressee, which is exactly the type of speech regulation this Court found constitutionally repugnant in *Swoboda*.

The ordinance criminalizes substantially more speech than is constitutionally permissible, including speech that does not include fighting words and speech that is not

directed to any particular individual. As such, it is facially overbroad and unenforceable. *See Stevens*, 559 U.S. at 473.

Conclusion

Carawell's speech directed toward Burgdorf and the other police officers was protected by the First Amendment and, as such, there was no probable cause for his arrest based upon his speech. St. Louis City Ordinance § 15.46.030 is both unconstitutional as applied as well as facially. Because there was no probable cause for Carawell's arrest, any items seized as a result of any search or inventory of items that occurred incident to an arrest should have been suppressed. The decision below should be reversed, and Carawell's conviction should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 3,736 words, as determined using the word-count feature of Microsoft Office Word 2013. The undersigned further certifies that the electronic file has been scanned and was found to be virus-free.

/s/ Anthony E. Rothert

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this brief was filed and served by operation of electronic filing system on all counsel of record on August 10, 2015.

/s/ Anthony E. Rothert